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No. .....

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In The
Supreme Court of the United States
October Term, 1982

VICTORY BAPTIST TEMPLE, INC.,
Petitioner,

vs.

INDUSTRIAL COMMISSION OF OHIO and
BUREAU OF WORKERS' COMPENSATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the Court of Appeals for the
Ninth Judicial District, Lorain County, Ohio

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QUESTIONS PRESENTED

1. Whether it is necessary for the state to prove (a) that mandatory participation in a statewide system of workers' compensation is the only way to ensure the latter's fiscal vitality and soundness; and (b) that no less drastic means exists to implement that system as to a church or churches, where it is claimed that a workers' compensation act as applied violates the right to religious freedom as guaranteed by the first and fourteenth amendments.

2. Whether a state constitutional reference to the establishment of a workers' compensation system to be created by "compulsory contribution thereto by employers" and a broad statutory definition of "employer" and "employee" in a workers' compensation act demonstrate a clearly expressed affirmative intention on the part of the legislature to include churches under coverage of the Act.

3. Whether the granting of summary judgment is improper where (a) bona fide constitutional claims involving first amendment freedoms exist, and (b) an indefinite and inadequate factual foundation hinders a full exploration of such claims, a ruling on which could affect many others in a similar position.

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To the Court of Appeals for the Ninth Judicial District, Lorain County, Ohio

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

VICTORY BAPTIST TEMPLE, INC., the Petitioner herein, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Ninth Judicial District, Lorain County, Ohio, entered in the above mentioned case on March 24, 1982. Petitioner's Motion requesting the Supreme Court of Ohio to direct the Court of Appeals for Lorain County to certify its Record was overruled on June 30, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Judicial District, Lorain County, Ohio, in *Victory Baptist Temple, Inc. v. Industrial Commission of Ohio,* is unreported but is printed in Appendix B hereto, at APP. 2, *infra.* The opinion of the Court of Common Pleas for Lorain County is unreported but is printed in Appendix C hereto, *infra,* at APP. 11.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Judicial District, Lorain County, Ohio (Appendix B, *infra,* at APP. 2) was entered on March 24, 1982. The Supreme Court of Ohio overruled Petitioner's Motion for an Order Directing the Court of Appeals for Lorain County to Certify its Record on June 30, 1982. Appendix A, *infra,* at APP. 1). The jurisdiction of the Supreme Court is invoked under 28 U. S. C. § 1257 (3).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The following provisions of the United States Constitution, the Constitution of the State of Ohio, and the Ohio Revised Code are involved in the questions presented:

First Amendment:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Fourteenth Amendment:

> "... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Ohio Constitution, § 7, Art. I—Rights of conscience; the necessity of religion and knowledge. APP. 20.

Ohio Constitution, § 35, Art. II—Workmen's compensation. APP. 20.

Ohio Revised Code, § 4123.01—Definitions. APP. 22.

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Ohio Revised Code, § 4123.37—Amenable employer; assessment; hearing. APP. 32.

Ohio Revised Code, § 4123.54—Compensation in case of injury, disease or death; agreement if work performed in another state; employers temporarily in Ohio. APP. 34.

Ohio Revised Code, § 4123.99 (C)—Penalties. APP. 37.

STATEMENT OF THE CASE

Victory Baptist Temple, Inc., Petitioner herein, is an independent and fundamentalist church that believes in and adheres to the Bible as the inspired and inerrant Word of God. It is a corporation not-for-profit under the laws of Ohio. Petitioner conducts several "ministries," that is, activities of the church which have biblical objectives as their sole purpose. Persons working in these ministries do so either on a voluntary basis or for financial remuneration depending on the circumstances. Victory Baptist possesses a Scriptural mandate to care for and maintain members of the church, particularly its employees, in time of need so that none of its people will be without food, clothing, shelter or other essentials due to accident or illness.[1]

On or about September 13, 1977, Petitioner requested a rating inspection by representatives of the Industrial Commission of Ohio and the Bureau of Workers' Compensation, the Respondents herein, the state agencies charged with the responsibility of implementing the provisions of the Workers' Compensation Act after their representatives had made Victory Baptist aware of the existence of the Act (O. R. C. § 4123.01, et seq.). In December of 1978, Victory Baptist was notified by Respondents that the church must submit a payroll report and remit premiums to the Industrial Commission, and further, was notified that if Petitioner did not comply with provisions of the Act, proceedings would be commenced under O. R. C. Sec. 4123. 37 and Sec. 4123.99 (C) which provide for fines and imprisonment. APP. 32 and 37. The church was informed

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[1]Distributing to the necessity of saints; given to hospitality. Romans 12:13.

that attachment of church property could also result. O. R. C. § 4123.12. APP. 25. Petitioner refused to submit to such demands for reasons of religious objection thereto. Submission to coverage under the Act would, Victory Baptist sincerely believes, be a flagrant usurpation of its duties under Romans 12:13. Petitioner holds a firm religious conviction that it would be a sin to remit payment of church funds as premium contributions to the state workers' compensation system in that the former are designated solely for biblical purposes. Finally, coverage of the Petitioner under the Act would, it believes, permit state surveillance of church internal affairs and records. O. R. C. §§ 4123.23 and 4123.26. APP. 25 and 26. *See,* Affidavits of Rev. Loser and Rev. Woodside.

On September 10, 1979, Petitioner filed the within action seeking declaratory and injunctive relief against Respondents averring, *inter alia,* as follows:

> (15) The application to plaintiff of the Ohio Workers' Compensation Law immediately threatens to impair plaintiff's right to the free exercise of religion and violates the prohibition of any law respecting the establishment of religion, both as provided in the First Amendment of the Constitution of the United States and made applicable to the states by the Fourteenth Amendment.
>
> • • •
>
> (26) The free exercise and establishment clause of the First Amendment of the Constitution of the United States forecloses jurisdiction by defendants' over plaintiff church because:
>
> (a) exercise of jurisdiction by defendants would give rise to serious constitutional questions; and
>
> (b) government entanglement in the affairs of plaintiff church would occur; and

(c) it is the intent of the judiciary to avoid constitutional questions; and

(d) there is no clearly expressed affirmative intention of the General Assembly that churches shall be subject to the Workers' Compensation Law and to jurisdiction by defendants.

In August of 1981, the parties herein filed respective motions for summary judgment pursuant to Rule 56 of the Ohio Rules of Civil Procedure, such motions being accompanied by stipulation of fact, affidavits on behalf of both sides, and an exhibit on behalf of Respondent. On October 2, 1981, based upon the written motions and accompanying evidence and without oral hearing, the lower court issued an Order and Opinion granting Respondents' motion while denying that of Victory Baptist, and more specifically holding as follows:

> The Court finds O. R. C. Chapters 4121 and 4123 do apply to plaintiff and its clerical and educational employees.
>
> • • •
>
> . . . such application is not violative of the First Amendment.

APP. 13.

On October 30, 1981, notice of appeal to the Court of Appeals for the Ninth Judicial District was duly filed. On March 24, 1982, the appellate court affirmed the decision of this lower court as follows in pertinent part:

> In the instant case, the language and legislative history admits to no other conclusion than that the General Assembly intended to include churches and their employees within the protection of the Workers' Compensation Law.
>
> • • •

> . . . (w)e find no constitutionally required exemption for appellant from the operation of the Workers' Compensation Act.
>
> • • •
>
> There being no genuine issue of material fact between the parties, the trial court properly granted appellee's motion for summary judgment pursuant to Civ. R. 56 (C).

APP. 5 and 9.

On April 23, 1982, Petitioner filed a notice of appeal to the Supreme Court of Ohio. On June 30, 1982, considering Petitioner's memorandum in support of jurisdiction as a motion for an order directing the court of appeals to certify its Record, the Supreme Court overruled same. APP. 1. While the Order of the Supreme Court of Ohio did not rule on the merits of the case at bar, Petitioner's memorandum in support addressed the issues set forth in the within petition as follows:

> *Proposition of Law No. 1*
>
> When a church demonstrates a sincerely-held religious objection to participation in the Ohio workers' compensation system and its accompanying investigative and enforcement statutes, and also demonstrates a religiously mandated duty to, among other things, care for and maintain the injured and needy employees of the church, then the burden shifts to the state to offer evidence demonstrating that the exclusion of that church, and other churches of like religious objection and duty, from participation in the workers' compensation system would undermine the fiscal vitality, soundness, and administration of the system, and further, that mandatory participation in the system by those churches is the only way to insure the fiscal vitality, soundness, and proper administration thereof.
>
> • • •

Proposition of Law No. 2

When a church demonstrates a sincerely-held religious objection to coverage under the Workers' Compensation Act, it is incumbent upon the court to determine whether or not such coverage would give rise to serious constitutional questions. If so, the court must then identify a clearly expressed affirmative intention on the part of the legislature before concluding that the Act covers that church as well as other churches of like religious objection.

• • •

Proposition of Law No. 3

The trial and reviewing courts are under a duty to view the evidence in support of and in opposition to a motion for summary judgment most strongly in favor of the party opposing the motion; are under a duty to give the latter party the benefit of all reasonable inferences drawn from such evidence; and are under a further duty to accept as true the evidence in opposition to that motion.

It is from the ruling of the Court of Appeals for the Ninth Judicial District, Lorain County, Ohio that Petitioner prays a writ of certiorari issue.

REASONS FOR GRANTING WRIT

1. **Certiorari should be granted in order to determine the appropriate burdens of proof and also the governmental interests of the state when first amendment rights are violated by a statewide system of compensation.**

In finding that no claims of religious freedom by the Petitioner mandated exemption from participation in and

coverage under the Ohio Workers' Compensation Act (O. R. C. § 4123.01 et seq.), the Court of Appeals for the Ninth Judicial District (appellate court) found this Court's recent decision in *United States v. Lee*, — U. S. —, 102 S. Ct. 105, 71 L. Ed. 2d 127 (1982) to be "controlling."[2] APP. 7. If *Lee* is pivotal in a court's decisionmaking process when such court is confronted with a given clash between a first amendment right and a mandatory statutory plan of compensation, then, Petitioner submits, the appellate court herein erred by improperly applying this Court's analysis in *Lee* to the case at bar, as will be seen below. Notwithstanding, important questions arise as to whether the facts and circumstances in *Lee* render it so materially distinguishable from those found in the cause herein as to render its use inappropriate. Finally, in closely tracking the *Lee* analysis in its Opinion, the appellate court herein remained silent on the state's burden, if any, of demonstrating that no alternative means exists for implementing any perceived governmental interest espoused under the Ohio Workers' Compensation Act. For the reasons given below, certiorari should be granted in order to clarify this Court's position on the relevancy of such burden on the state when free exercise rights are at issue.

a. The appellate court applied U. S. v. Lee improperly.

In *Lee* this Court ruled that the imposition of social security taxes is not unconstitutional as applied to Mr.

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[2]Petitioner notes that as the *Lee* decision was not rendered until February 23, 1982, the trial court herein was unaware of such decision when it issued its Order and Opinion on October 2, 1981. APP. 11.

Lee, a self-employed farmer of the Old Order Amish faith, who claimed a sincerely-held and biblically based objection to the receipt of public insurance benefits and to payment of taxes in his capacity as an employer, to support such insurance. 71 L. Ed. 2d at 127, 128, 132-134. While acknowledging the sincerity of Mr. Lee's beliefs, this Court described the "overriding governmental interest" as follows:

> Because the social security system is nationwide, the governmental interest is apparent. . . . The social security system is by far the largest domestic governmental program in the United States today, distributing approximately $11 billion monthly to 36 million Americans. . . . This mandatory participation is indispensible to the fiscal vitality of the . . . system . . . (W)idespread individual voluntary coverage . . . would undermine the soundness of the . . . program . . . (and) would be almost impossible, to administer.

Id. at 133.

Thus, the "fiscal vitality" and "soundness" of the social security system was deemed of such paramount importance by this Court so as to warrant the overriding of Mr. Lee's legitimate religious objection. However, in the case at bar, the appellate court ruled in its Opinion that the overriding governmental interest in mandating participation by Victory Baptist in the state workers' compensation system is "in compensating workers and their dependents for death, occupational disease, and injury during the course of employment." APP. 8. However commendable such a goal surely is, Petitioner submits that its use was inappropriate and in error under *Lee*. No consideration was given nor reference even made to a stated interest in the "soundness" of the system and the perceived

effect of Petitioner's religiously-based objections and ultimate exemption from coverage therefrom. Further, the Respondents failed utterly to offer any evidence in this regard. While the Victory Baptist is not in position qualifying it to shed light on the monetary aspects of Ohio's workers' compensation system, it has in any event, taken the liberty of offering a viable alternative means of compensating church workers under its own biblical mandate. Romans 12:13.

In granting certiorari herein, this Court could elaborate on appropriate governmental interest(s) to be considered by a court when weighing such interest(s) against religious objections to systems of compensation.

b. The case at bar is materially distinguishable from U. S. v. Lee.

This case raises important questions which need to be addressed by this Court as to whether the rationale in *Lee* is appropriate precedent when a party claims that a statewide system of mandatory compensation interferes with and infringes upon free exercise of religion. Petitioner submits that the interests of the State of Ohio in maintaining a statewide workers' compensation system are materially distinguishable from the interests of the United States government in maintaining a nationwide system of retirement benefits for all residents of the United States which was the subject of review in *Lee*; furthermore, both courts herein below failed to sufficiently examine the interests of the state in maintaining such a benefit program for Ohio workers and why those interests could be satisfied only if churches such as Victory Baptist were compelled to participate.

The federal social security system is "by far the largest domestic governmental program in the United States today" with contributions being derived from and benefits going to potentially *all* American citizens who meet the eligibility requirements. Id. at 133. However, the Ohio workers' compensation system is merely *statewide* effecting *only* certain employers for purposes of contribution thereto and only certain employees and their dependents who fall within its coverage. Judicial notice may be appropriate for the proposition that the proportion of Americans who grow old and become entitled to social security retirement payments from the federal government is much greater than the proportion of Ohio workers who are disabled in the course of their employment and who thereby become eligible for reimbursement from the state insurance fund. In the cause herein, petitioner is a church, not an individual, as is found in *Lee*, objecting on religious grounds to participation in the *statewide* workers' compensation system. In this regard, it would not be unreasonable to assume that there are fewer churches than persons located within the boundaries of the State of Ohio. Furthermore, only those Ohio churches capable of demonstrating sincerely-held religious objections similar to those of Petitioner would be entitled to an exemption from mandatory participation. Thus, the potential for a "myriad of exceptions" of which this Court was apprehensive in *Lee* and of which the appellate court herein was concerned is greatly reduced. Id. at 134.

From a monetary standpoint, *Lee* emphasizes that the social security system distributes approximately $11 billion monthly to 26 million Americans. Id. at 133. On that basis this Court found that "mandatory participation" in

the social security system "is indispensible to the *fiscal vitality*" of the system making the government's interest in this regard "very high." Id. at 133. Thus, Mr. Lee could not care for the elderly and needy Amish people solely under methods in conformance to his religious beliefs outside of the social security system because, the Court ruled, *it would undermine* the "fiscal vitality" and "soundness" of the *national system.*

For the foregoing reasons, Petitioners submit that it is essential that this Court offer guidance on the above-stated distinguishing elements of its decision in *Lee* and point out the error of the appellate court herein in misusing same.

c. Whether the less drastic means test remains relevant.

As early as *Cantwell v. Connecticut,* 310 U. S. 296, 304 (1940) this Court declared that the state's "power to regulate" in the area of protected freedoms "must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedoms." The court has likewise applied this less drastic means test to cases involving claims of infringement upon free exercise of religion. Beginning with this Court's ruling in *Sherbert v. Verner,* 374 U. S. 398, 406, 407 (1963) (alleged abuse of the unemployment compensation fund) and continuing with *Wisconsin v. Yoder,* 406 U. S. 205, 215, 218, 221 (1972) (alleged violation of compulsory school attendance laws by Amish) and recently in *Thomas v. Review Board of Indiana Employment Security Division,* 450 U. S. 707, 718 (1981), it has been consistently held that upon the demonstration of a sincerely-held religious belief the free exercise of which is

burdened by some statutory requirement, the state must not only show a compelling interest which justifies the infringement but also that no less restrictive alternative means of satisfying that interest exists. Yet in the case at bar, the appellate court offered no indication that it deemed crucial the Respondent's failure to demonstrate that no less restrictive alternative means of satisfying O. R. C. § 4123.01 et seq. exists.

In its analysis of Mr. Lee's constitutional claim, this Court utilized the first and second tier of the three part test found in *Thomas, Yoder,* and *Sherbert, supra,* holding that while the social security system interferes with the free exercise of Amish belief "(t)he state may justify a limitation on religious liberty by showing . . . an overriding governmental interest." 71 L. Ed. 2d at 132. It was found in that the government's interest in "mandatory and continuous participation in and contribution to the social security system is very high." Id. at 133. However, this Court did not discuss the burden on the state to show that no less drastic means was available. Rather, the "remaining inquiry" by the Court was "whether accommodating the Amish belief will unduly interfere with fulfillment of the governmental interest." Id. at 133. Because this could potentially impose a lesser burden of proof on the state when first amendment claims are raised against the enforcement of government compensation systems such as that created under the Ohio Workers' Compensation Act, it is important that certiorari be granted in order that this Court might clarify the role, if any, of the less drastic means test in regard to such claims.

In contrast to the test in *Thomas, Yoder,* and *Sherbert, supra,* where the state was required to show that no less

drastic means were available to accomplish a compelling interest, the state under the *Lee* rationale would only be required to show that "accommodating" the constitutional claim will "unduly interfere" with the state's compelling interest. The state's interest, rather than the rights guaranteed and protected by the first and fourteenth amendments, would be in a preferred position or an assumed standpoint of priority.

2. Certiorari should be granted in order to determine whether a statewide system of compensation includes in its coverage a church or churches claiming serious violation of constitutional rights.

In *NLRB v. Catholic Bishop of Chicago*, 440 U. S. 490 (1979), this Court considered the assertion that the National Labor Relations Board could exercise jurisdiction over religious schools. In denying such jurisdiction to the NLRB, the Court undertook to examine the legislative history of the National Labor Relations Act:

> [I]t is encumbent upon us to determine whether the board's exercise of its jurisdiction here would give rise to serious constitutional questions. If so, we must first identify "the affirmative intention of the Congress clearly expressed" before concluding that the act grants jurisdiction.

440 U. S. at 501. The Court observed that not only conclusions of the Board in resolving employer/union disputes infringe upon the first amendment rights of the employer, but that "the very process of inquiry" leading to those conclusions could so infringe. Id. at 504.

In the case at bar, there is no indication whatsoever, Petitioner submits, that the Ohio General Assembly expressly intended O. R. C. § 4123.01 et seq. to include churches such as Victory Baptist under its coverage. However, the appellate court, in citing Sec. 35, Art. II, of the Ohio Constitution which calls for the establishment of a workers' compensation system with "compulsory contribution thereto by employers" and O. R. C. § 4123.01 (A) and (B) which define "employer" and "employee" respectively in broad and general terms, ruled that "the language and legislative history admits to other conclusion than that the General Assembly intended to include churches and their employees" under the Act. APP. 5 and 6. This was error. Petitioner submits that none of the above amounts to a "clear expression of an affirmative intention." However, certiorari should be granted in order to decide the important issue of whether "catch-all" statutory language such as that found in Sec. 35, Art. II of the state constitution and O. R. C. § 4123.01 (A) and (B) indeed satisfies this Court's prescribed test. Additionally, Petitioner refers the Court to Section 7 of Article I of the Ohio Constitution which places a "duty" on "the General Assembly to pass suitable laws, to protect every religious denomination in the peaceable enjoyment of its own mode of public worship." APP. 20.

Petitioner notes one further point in this regard. O. R. C. § 4123.54 calls for an inquiry into aspects of the relationship between the church and its workers. APP. 34. The "very process" of that inquiry could place the Respondents in the position of examining church doctrine and church authority, and of rendering a decision based upon that examination. For example, a determination of

whether a church employee was injured while acting in the course of his employment or on behalf of his employer, the church, could well entail an interpretation of church doctrine and an examination of the church's own religious mission. Again, it was the *potential* threat to first amendment freedoms posed by such an inquiry that this Court warned against in *NLRB v. Catholic Bishop,* and whether such an inquiry would *actually* result in an administrative interpretation of church doctrine and authority is of no consequence.

3. Certiorari should be granted to decide important questions concerning the appropriateness of summary judgment in cases involving first amendment claims.

The opinion of the appellate court herein presents important questions not heretofore addressed by this Court concerning the role, if any, that summary proceedings play when the party opposing a summary judgment motion makes claims of interference by the state with first amendment freedoms. Victory Baptist submits that the court erred in affirming the granting of summary judgment. Not only are there genuine issues of material fact remaining for further evidentiary proceeding, but because petitioner presents bona fide first amendment claims, which could affect many others in the State of Ohio holding similar beliefs and positions, the cause herein should have, at the very least, been remanded to the lower court for amplification of the record. Thereupon, petitioner's claims could have been more closely scrutinized.

This Court has long held that when considering the evidence in support of and in opposition to a motion for

summary judgment, a court is under a duty to view such evidence most strongly in favor of the party opposing the motion, giving that party the benefit of all reasonable inferences. *U. S. v. Diebold*, 369 U. S. 654, 655 (1962). However, when such opposing party presents constitutional claims or defenses, the duty of the Court, as discussed below, is more stringent.

On the basis of the pleadings, stipulation of fact, four affidavits and one exhibit, the appellate court herein affirmed the granting of summary judgment in favor of the Industrial Commission and Bureau of Workers' Compensation.[3] In summary fashion, without the benefit of a full evidentiary hearing before the trier of fact, the court allowed the overriding of Victory Baptist's free exercise rights by the Respondents' interest in the provisions of the Workers' Compensation Act. This was error.

Kennedy v. Silas Mason Co., 334 U. S. 249, 251, 256 (1948) involved the application of the overtime provisions of the Fair Labor Standards Act to certain persons who worked in a government-owned plant producing munitions. This Court acknowledged therein that when a decision on an issue could potentially affect the rights of many others (in that case other workers), "(n)o conclusion in such a case should prudently be rested on an indefinite factual foundation." This Court affirmed such an approach in *Phillips v. Martin Marietta Corp.*, 400 U. S. 542, 544 (1971) (summary judgment is improper when an inadequate record impairs resolution of important issues involving pur-

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[3]The stipulations herein were not considered the sole evidence. *See, Cunningham v. J. A. Meyers, Co.*, 176 Ohio St. 140 (1964). Also, APP. 2.

ported violations of the Civil Rights Act of 1964). In the cause herein, the summary disposition of petitioner's constitutional claims will have a potentially adverse effect on other churches located in Ohio which hold similar beliefs.[4]

The case of *Perry v. Sinderman*, 408 U. S. 593 (1972) is also pertinent. This Court ruled that where bona fide constitutional claims exist (in that case, the right of a professor to publicly criticize policies of the college administration), summary judgment is improper "without full exploration of the issue." Id. at 595, 598. Not only did the cause herein present "bona fide" first amendment claims, but also genuine questions of material fact which have yet to be addressed at a hearing on the merits. A review of the record shows that it is replete with instances where, upon examining the affidavits in support of and in opposition to the Respondents' summary judgment motion, the lower court either resolved questions of material fact or brought into question the truth or falsity of the religious beliefs of the Petitioner. This was error. *U. S. v. Diebold, supra; see U. S. v. Ballard*, 322 U. S. 78 (1943) (the truth or falsity of a religious stance is not subject to examination).

Perhaps the most striking example of a material question of fact in the case at bar is the question of the existence of any alternative less drastic means by which the Industrial Commission and the Bureau of Workers' Com-

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[4]Attached as Appendix E is a list of churches submitted to the Ohio Supreme Court, of which Petitioner is aware, who hold similar religiously based objections to coverage to the Act.

pensation can have their interest, as exemplified under the Act, fulfilled while at the same time refraining from an interference with Victory Baptist's free exercise rights. In their pleadings, Respondents have argued that the "self-insured" provision of the Act under O. R. C. § 4123.35 is available to the Petitioner. APP. 27. *See, First National Bank of Arizona v. Cities Service Co.*, 391 U. S. 253, 289 (1968) (a party cannot rest on assertions made in unverified pleadings, briefs, or oral argument of counsel). Initially, Victory Baptist would note that a scrutiny of O. R. C. § 4123.35 demonstrates that *any* employer would encounter awesome difficulties in attempting to comply with its provisions. For purposes of considering Respondents' motion, it can be inferred that appellant *could not* in good conscience participate. *U. S. v. Diebold, supra.* Both parties have offered conflicting alternatives (Victory Baptist with its biblical mandates under Romans 12:13 and the Industrial Commission with the provisions of O. R. C. § 4123.35); a *material fact* issue has been raised as to which alternative, if either, is indeed the most acceptable. A full evidentiary hearing before the trier of fact is necessary to resolve this dilemma.

Therefore, neither was there a definite factual foundation as called for in *Kennedy*, nor were all the relevant issues "fully explored" as required under *Perry*. For the foregoing reasons, it was improper for the Court of Appeals for the Ninth Judicial District to affirm the granting of summary judgment in favor of Respondents.

CONCLUSION

WHEREFORE, Petitioner respectfully prays that a writ of certiorari be granted.

Respectfully submitted,

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